Peak Hua Industries Bhd v Peak Hua Holdings Bhd & Ors

HIGH COURT (KUALA LUMPUR) — SUIT NO D4–22–580 OF 1989
ABDUL MALIK ISHAK J
27 NOVEMBER 2004

Civil Procedure — Action — Dismissal of action — Want of Prosecution — Inordinate and inexcusable delay — Delay of 20 years — Whether delay prejudicial — Whether risk to fair trial

Civil Procedure — Action — Discontinuance of — Action was discontinued against some defendants — No leave of court — No notice to other defendants — Whether abuse of court process — Rules of the High Court 1980 O 21 r 3

The third, fourth, fifth, sixth and seventh defendants filed their respective appeals against the decision of the senior assistant registrar ('SAR') for dismissing their respective applications, inter alia, for dismissal of the action for want of prosecution. The common grounds in all the applications were, inter alia, that: (i) there had been inordinate and inexcusable delay on the part of the plaintiff in the action; (ii) the plaintiff had selectively discontinued the action against, among others, the second and 18th defendants without leave of the court and without giving any notice to other defendants, as required by O 21 r 3 of the Rules of the High Court 1980.

Held, allowing the appeals with costs:

(1) The defendants were seriously prejudiced by the inordinate and inexcusable delay in prosecuting the action as it was based on events which happened some 21 years ago (see para 12).

(2) The long delay would also give rise to a substantial risk that a fair trial would not be possible or that it would likely to cause or to have caused serious prejudice to defendants' defence in the action as it would be very difficult for them to remember in detail the facts which took place in 1983 (see para 71).

(3) It was totally unfair to allow the action to be hung over the heads of the defendants over the years as its existence had lowered the credit standing and reputation of the defendants for all these years (see para 17).

(4) The plaintiff did not explain why it had decided to discontinue the action against those selected defendants and the plaintiff also did not apply to the court for their discontinuance. This blatant disregard of the Rules of the High Court 1980 must be construed as an abuse of process (see para 16).

(5) The plaintiffs action in proceeding against the rest of the defendants was the collective decision of the board of directors of which the second

defendant was the then managing director. Thus, it must be held to be vexatious, not *bona fide* and must be construed as an abuse of the process of the court (see para 55, 56 and 58).

(6) Further, the plaintiff's action should be dismissed for want of prosecution because it failed to proceed promptly in accordance with the successive steps in the action following closely the prescribed rules of practice and there was also the blatant disregard of the order of the court in regard to the summons for directions. All these must be construed to be an abuse of the process of the court. Moreover, public policy too coupled with the requirements for the speedy and smooth administration of justice demand that an action should proceed expeditiously to judgment (see paras 62 and 71).

[**Bahasa Malaysia translation**

Defendan-defendan ketiga, keempat, kelima, keenam dan ketujuh masing-masingnya memfailkan rayuan mereka terhadap keputusan penolong kanan pendaftar ('SAR') yang menolak permohonan mereka yang bahawa tindakan ini dibuang kerana 'want of prosecution'. Alasan-alasan yang dikemukakan didalam permohonan ini adalah antara lainnya bahawa: (i) terdapat kelewatan yang tidak wajar dan tidak munasabah di pihak plaintif di dalam tindakan ini; (ii) plaintif secara selektif telah menamatkan tindakan terhadap defendan-defendan kedua dan ke-18 tanpa memohon kebenaran mahkamah dan tanpa memberi sebarang notis kepada defendan-defendan lain sebagaimana yang diperuntukkan di bawah A 21 k 3 Kaedah-Kaedah Mahkamah Tinggi.

Diputuskan, membenarkan rayuan dengan kos:

(1) Defendan-defendan telah secara serius diprejudiskan oleh kelewatan yang tidak wajar dan tidak munasabah di dalam pendakwaan kes ini kerana tindakan ini didasarkan oleh peristiwa yang berlaku lebih 20 tahun yang lalu (lihat perenggan 12).

(2) Kelewatan yang panjang ini menimbulkan risiko yang besar kerana perbicaraan yang adil adalah tidak bermungkinan atau ianya akan menyebabkan prejudis yang serius terhadap pembelaan defendan-defendan kerana ianya susah bagi mereka untuk mengingati dengan jelas butiran fakta yang berlaku dalam tahun 1983 (lihat perenggan 71).

(3) Ianya adalah tidak adil untuk membenarkan tindakan ini berlarutan terhadap defendan-defendan kerana kewujudannya telah merendahkan kedudukan kredit dan reputasi defendan-defendan selama tahun-tahun tersebut (lihat perenggan 17).

(4) Plaintif tidak menjelaskan kenapa ia mengambil keputusan untuk menamatkan tindakan terhadap defendan-defendan tertentu dan plaintif

juga tidak memohon kepada mahkamah untuk penamatan tersebut. Inimerupakan satu ketidakpatuhan kaedah-kaedah mahkamah yang mesti dianggap sebagai satu penyalahgunaan proses (lihat perenggan 16).

(5) Tindakan plaintif meneruskan tindakan terhadap defendan-defendan yang lain adalah merupakan keputusan bersama ahli lembaga pengarah yang mana defendan kedua merupakan seorang pengarah urusan pada waktu itu. Oleh yang demikian, ianya hendaklah dianggap tidak *bona fide* dan hendaklah dianggap sebagai satu penyalahgunaan proses mahkamah (lihat perenggan 55, 56 dan 58).

(6) Selanjutnya, tindakan plaintif patut dibuang 'for want of prosecution' kerana ia gagal untuk meneruskan secara tepat mengikut langkah-langkah di dalam tindakan ini menurut kaedah-kaedah amalan yang termaktub dan juga terdapat ketidakpatuhan yang ketara berhubung dengan saman untuk arahan. Kesemua ini hendaklah ditafsirkan sebagai satu penyalahgunaan proses mahkamah. Tambahan lagi, polisi awam bersama-sama dengan keperluan untuk pentadbiran undang-undang yang licin dan cepat menuntut sesuatu tindakan hendaklah diteruskan secara cepat sehingga ke penghakiman (lihat perenggan 62 dan 71).]

Notes

For cases on discontinuance of action, see 2(1) *Mallal's Digest* (4th Ed, 2004 Reissue) paras 81–87.

For cases on dismissal of action for want of prosecution, see 2(1) *Mallal's Digest* (4th Ed, 2004 Reissue) paras 88–100.

Cases referred to

Biss v Lambeth, Southwark and Lewisham Area Health Authority (Teaching) [1978] 1 WLR 382 (refd)

Castanho v Brown & Root (UK) Ltd & Anor [1981] AC 557 (refd)

Confidence Concrete Sdn Bhd v Shimizu-Peremba Sdn Bhd [1994] 1 MLJ 465 (refd)

Datuk Samy Vellu v Karpal Singh [1989] 3 MLJ 493 (refd)

Goh Koon Suan v Heng Gek Kiau & Ors [1991] 2 MLJ 307 (refd)

Ho Weng Kong v Mann Foong Realty Sdn Bhd & Anor [2000] MLJU 222 (refd)

Hongkong Bank (M) Bhd v Raja Letchumi a/p Ramarajoo & Ors [1996] 2 MLJ 34 (refd)

Majlis Peguam Malaysia & Ors v Raja Segaran S. Krishnan [2002] 3 MLJ 155 (refd)

Mayban Securities Sdn Bhd v Fung Lai Chuen (f) & Anor [2002] 7 MLJ 411 (refd)

Negara Properties Sdn Bhd v Akitek Bersekutu, Malaysia (sued as a firm) & Ors [1996] 2 CLJ 923; [1995] 2 MLJ 185 (refd)

Omega Securities Sdn Bhd v Public Bank Bhd [1999] 5 MLJ 1 (refd)

R Rajasingam v Balwant Singh Purba [1996] 2 MLJ 549 (refd)

Raja Zainal Abidin bin Raja Haji Tachik & Ors v British-American Life & General Insurance Bhd [1993] 3 MLJ 16 (refd)

TM Feroze Khan Ors v Meera Hussain bin TM Mohamed Mydin [1997] 3 MLJ 800 (refd)

Toh Hock Thye & Ors v Toh Chwee Blow [1982] 1 MLJ 152 (refd)

Trustees of Leong San Tong Khoo Kongsi (Penang) Registered & Anor v Lee Boon Tin [1998] 4 MLJ 373 (refd)
Vasudevan v T Damodaran & Anor [1981] 2 MLJ 150 (refd)

Legislation referred to

Bills of Exchange Act 1949
Rules of the High Court 1980 O 18 r 19, O 21 rr 2(4), 3, 3(1), O 25 r 1, O 34, O 92 r 4
Stamp Act 1949

Saseedaran Achan (Achan & Co) for the plaintiff.
Sng Eu Kim (Sng & Co) (Sng & Co) for the fourth defendant.
Teh Hong Koon (Skrine & Co) for the third defendant.
Ching Mew Ling (Ching Mew Ling) for the fifth and sixth defendants.
Jimmy Yeap Cheng Hoe (CH Yeap & Maluda) for the seventh Defendant.

Abdul Malik Ishak J:

INTRODUCTION

[1] This judgment concerned four enclosures, namely, encls 187, 188, 189 and 190. These enclosures concerned four different defendants and for ease of reference they may be identified as follows:

(a) the fourth defendant by the name of Lee Soon Heng @ Lee Chan Fai and the relevant enclosure would be encl 187;

(b) the third defendant by the name of Chan Siew Thong with encl 188 as the relevant enclosure;

(c) the seventh defendant by the name of Kuan Peng Ching @ Kuan Peng Soon with encl 189 as the relevant enclosure; and, finally,

(d) the fifth and the sixth defendants known as Chin Yim Kuan and Lim Kok Cheong respectively and the relevant enclosure for both of them would be enclosure 190.

[2] I will now proceed to examine these four enclosures separately.

ENCLOSURE 187 — THE FOURTH DEFENDANT (LEE SOON HENS @ LEE CHAN FAI)

[3] The fourth defendant filed an application by way of a summons in chambers in encl 156 for, *inter alia*, an order to strike out the plaintiffs writ and the statement of claim pursuant to the inherent jurisdiction of the court and for dismissal of the same for want of prosecution pursuant to O 18 r 19 of the Rules of the High Court 1980 ('RHC'). The learned senior assistant registrar ('SAR') dismissed encl 156 and being aggrieved the fourth defendant filed an appeal to the judge in chambers as seen in encl 187.

[4] The law in regard to dismissal of action for want of prosecution has been documented in the law journals. Suffice for this exercise that reference should be made to the Federal Court case of *Vasudevan v T Damodaran & Anor* [1981] 2 MLJ 150. There Eusoffe Abdoolcader J, writing for the Federal Court (with a coram of Raja Azlan Shah CJ (Malaya), Wan Suleiman FJ and Eusoffe Abdoolcader J) laid down the law in regard to the dismissal of an action for want of prosecution in this way (see p 150 of the report):

(a) Dismissal of action for want of prosecution

The House of Lords in *Birkett v James* [1978] AC 297, 317, 326, approving the decision of the English Court of Appeal in a trilogy of appeals reported *sub nomine Allen v Sir Aflred McAlpine & Sons Ltd* [1968] 2 QB 229, 245, 268, held that the power of the court to dismiss an action for want of prosecution should be exercised only where the plaintiffs default had been intentional and contumelious or where there had been inordinate and inexcusable delay on his or his lawyers' part giving rise to a substantial risk that a fair trial would not be possible or to serious prejudice to the defendant but, other than in a case of contumelious conduct on the plaintiffs part, should not normally be exercised where the delay had not extended beyond the end of the limitation period for the cause of action, and the House further observed *per curiam* that where a defendant is seriously prejudiced by a writ being issued long after the cause of action has accrued, albeit within the limitation period, the plaintiff must thereafter pursue his action with diligence and the action can only be dismissed (after expiry of the limitation period) for want of prosecution if the delay subsequent to the issue of the writ exceeds the time limits prescribed by the rules of court and is inordinate and inexcusable having regard to the delay before the issue of the writ, and the delay after the issue of the writ has caused some additional prejudice to the defendant beyond that already suffered by him by reason of the delay in bringing the action. The House of Lords in *Bremer Vulkan Schiffbau Und Maschinenfabrik v South India Shipping Corporation* [1981] 1 All ER 289; 2 WLR 141 again restated and discussed these principles but held they do not apply to arbitration proceedings.

We would specifically refer to the propositions enunciated by Salmon LJ in *Allen v Sir Alfred McAlpine & Sons Ltd* [1968] 2 QB 229, 245, 268 (at p 268) to the effect *inter alia* in relation to the inordinate delay being inexcusable that as a rule, until a credible excuse is made out, the natural inference would be that it is inexcusable, and again with regard to the question of serious prejudice to defendants by the delay, that this may be prejudice at the trial of the issue between themselves and the plaintiff or between each other or between themselves and third parties, and that as a rule, the longer the delay, the greater the likelihood of serious prejudice at the trial. The decision of the English Court of Appeal in *Biss v Lambeth, Southwark and Lewisham Area Health Authority (Teaching)* [1978] 1 WLR 382, 389 (distinguishing *Birkett v James* [1978] AC 297, 317, 326 on a point under the English Limitation Acts 1939 to 1975 not material for the purposes of the present appeal) is to the effect that in determining whether the delay after the writ had been issued is substantial, the court has to consider whether the delay has prejudiced both a fair trial and the defendants, and in considering the prejudice to the defendants, the delay after the issue of the writ has to be considered against the delay before issue,

A and whether such delay has substantially prejudiced the defendants. We would draw particular attention to the judgment of Lord Denning MR, stating (at p 389) that prejudice to a defendant by a plaintiffs delay is not limited to the death or disappearance of witnesses or their fading memories or in the loss or destruction of records since there is much prejudice to a defendant in having an action hanging over his head indefinitely, not knowing when it is gong to be brought to trial.

B

[5] Briefly put, the power of the court to dismiss an action for want of prosecution should only be exercised:

(1) where the plaintiffs default had been intentional and contumelious; or

C (2) where there has been inordinate and inexcusable delay giving rise to a substantial risk that a fair trial would not be possible; or

(3) that it would cause serious prejudice to the defendant.

D **[6]** Here, before me, the fourth defendant asserted that there had been inordinate and inexcusable delay and the details thereto may be stated in this way:

(a) it took the plaintiff three and a half years after the close of the pleadings to file the summons for directions;

(b) it took the plaintiff two years after the order for summons for
E directions was issued to file the notice for setting down the action for trial;

(c) it took the plaintiff seven months to file its notice for pre-trial case management after O 34 of the RHC has been in force; and

(d) for a period of three years, the plaintiff had not taken any
F action whatsoever to expedite the action for trial after the second

(e) defendant's appeal to the Court of Appeal was dismissed on 23 March 1998.

[7] The aggregate time period for the delay came up to not less than nine
G years.

[8] Now, as a rule, such inordinate delay will be inexcusable until a credible excuse was made out (*Vasudevan*'s case). The plaintiff advanced the following excuses:

(1) that the various defendants had filed applications to strike out
H the actions; and

(2) the last of the appeal was only disposed of on or about the 2 April 2001.

[9] By way of a rebuttal, the fourth defendant had this to say:

I (a) that most of the applications by the various defendants for striking out were filed in 1989 and 1990 and that was 13 to 14 years ago; and

(b) the fact that there were pending appeals, at the material time, did not mean that the plaintiff was not bound to comply with the RHC by diligently proceeding with the action against all the defendants including the fourth defendant.

[10] Dato' Dr Visu Sinnadurai J (as he then was) in *Negara Properties Sdn Bhd v Akitek Bersekutu, Malaysia (sued as a firm) & Ors* [1996] 2 CLJ 923, had occasion to consider an application to strike out the plaintiffs claim for want of prosecution. At page 924 of the report, his Lordship held as follows (see the headnotes):

(3) The rules of the court impose a duty on the plaintiff to get the machinery moving for the early disposal of the plaintiffs claim. Itis always for the plaintiff to take all the steps to prosecute the claim and the entire machinery does not come to a halt just because the defendant had not taken the next necessary steps. In the circumstances the defendants' conduct in not complying with the order of the SAR did not bar them from making the present application to strike out the plaintiffs action.

[11] It cannot be denied that the plaintiff here did not put the 'machinery moving for the early disposal' of its case. In *Ho Weng Kong v Mann Foong Realty Sdn Bhd & Anor* [2000] MLJU 222, Abdul Hamid Embong J, went further to hold that the delay of one year by the plaintiff in taking out the summons for directions amounted to an abuse of process that entitled the court to dismiss the plaintiffs claim.

[12] In my judgment, the fourth defendant was seriously prejudiced by the inordinate and inexcusable delay in prosecuting the action. In the words of Eusoffe Abdoolcader J in *Vasudevan*'s case, 'the longer the delay, the greater the likelihood of serious prejudice at the trial' (see p 151). Factually speaking, the action was filed in 1989 based on events which happened in 1983 — some 21 years ago. At that time, the fourth defendant was in his 40's. Now, the fourth defendant is far older — in his 60's, I would agree with the submission that the fourth defendant has already forgotten a major part of what actually happened in 1983. The fourth defendant is a victim of fading memory. Who is to be blamed for the delay? It should be the plaintiff and no one else.

[13] In his affidavit, the fourth defendant averred to the following frightening facts:

(a) that the third and the fifth defendants are now in their 70's;

(b) that the 11th defendant (not a party to the enclosures) has since passed away;

(c) that the third defendant could barely walk without assistance; and

(d) that the fifth defendant has been admitted to the hospital on numerous occasions with breathing difficulties.

[14] Old age must have caught up with them.

[15] To confound the matter further, the plaintiff had also selectively discontinued the present action against, among others, the second and the eighteen defendants, without:

(i) leave of the court; and without

(ii) giving any notice to the fourth defendant,

as required by O 21 r 3 of the RHC. It must be borne in mind that selective discontinuance will not only hinder the hearing process of a fair trial but it will also have far reaching consequences when it comes to apportionment of liabilities especially if and when the defendants are found liable.

[16] According to the fourth defendant, the second defendant has, at all material times, been a key player to the events as alleged by the plaintiff. The second defendant was one of the signatories to the sale and purchase agreement on which the entire action was based. Till to date, the plaintiff has yet to explain why it has decided to discontinue the action against those selected defendants and the plaintiff too saw it fit not to apply to the court for their discontinuance. This blatant disregard of the Rules of the High Court must be construed as an abuse of process and must be frowned upon bearing in mind the inordinate and inexcusable delay in prosecuting this case.

[17] I am told that the fourth defendant is both a politician and a businessman. The prolongation of this action for 14 lingering years has seriously prejudiced the fourth defendant. It was said that the existence of this action has lowered the credit standing of the fourth defendant for all these years. He has suffered, so it seems, all these years in abject silence. In *Vasudevan*'s case, his Lordship Eusoffe Abdoolcader J, agreed with what Lord Denning MR said in the English Court of Appeal case of *Biss v Lambeth, Southwark and Lewisham Area Health Authority (Teaching)* [1978] 1 WLR 382, 389 to the following effect (using the words as paraphrased by his Lordship Eusoffe Abdoocader J in *Vasudevan*'s case):

> … that prejudice to a defendant by a plaintiffs delay is not limited to the death or disappearance of witnesses or their fading memories or in the loss or destruction of records since there is much prejudice to a defendant in having an action hanging over his head indefinitely, not knowing when it is going to be brought to trial.

[18] So it can be surmised from the above factual matrix that the fourth defendant had suffered prejudice as a result of the plaintiffs inordinate and inexcusable delay.

[19] Not to be outwitted, the plaintiff alleged that the fourth defendant has also failed to:

(i) take the necessary steps to prosecute this matter all these years;

(ii) file the documents and the affidavit verifying the same; and

(iii) give any explanation for the delay in prosecuting this matter.

[20] It was urged upon me that the conduct of the fourth defendant should prevent him from succeeding in his appeal in encl 187. To this, and by way of a retort, I need only refer to the judgment of Dato' Dr Visu Sinnadurai J in *Negara Properties Sdn Bhd v Akitek Bersekutu, Malaysia (sued as a firm) & Ors*, particularly to p 939 where the learned judge had this to say:

> (2) Defendant's conduct
>
> As pointed out earlier, there is no rule of law stating that any inaction on the part of the defendant would bar him from obtaining an order to strike out the plaintiffs action: see *Trill and Roebuck*. The only exception to the rule appears to be where the defendant had taken an active role in negotiating a settlement with the plaintiff: see the discussion above. There is no such suggestion in the present case. The plaintiff merely relies on the fact that the defendants themselves had not complied with the order of the SAR. However, it must be remembered that the rules of the court impose a duty on the plaintiff to get the machinery moving for the early disposal of the plaintiffs claim. Strictly speaking, the defendant is not burdened with a similar duty. If the defendant chooses not to take advantage of the rules which are in his favour, he bears the consequences of his omissions.
>
> Furthermore, there are sufficient rules, like O 13 (default of appearance); O 19 (default of defence): and O 24 r 16 (failure to comply with order for inspection or discovery), providing the plaintiff with necessary relief like proceeding with the action, entering judgment against the defendant or having the defence struck off. The entire machinery does not come to a halt just because the defendant had not taken the next necessary steps. On the contrary, it is always for the plaintiff to take all the steps to prosecute the action.
>
> I therefore conclude, in the light of the existing authorities, that the defendants' conduct in the present case does not in any way bar them from making the present application to strike out the plaintiffs action.

[21] I gratefully adopt the speech of the learned judge to the facts of the present appeal.

[22] For the reasons as adumbrated above, the delay of 14 years was caused by the plaintiff and that delay was inordinate and inexcusable. The delay too had seriously prejudiced the fourth defendant and had prevented a fair trial of the action. That delay may be construed as an abuse of the process of the court pursuant to O 18 r 19 of the RHC. Consequently, I must allow the fourth defendant's appeal in encl 187 with costs.

ENCLOSURE 188 — THE THIRD DEFENDANT (CHAN SLEW THONG)

[23] The third defendant in encl 188 filed an appeal against the decision of the SAR in dismissing with costs the application of the third defendant to

dismiss the action for want of prosecution pursuant to the inherent jurisdiction of the court under O 92 r 4 of the RHC.

[24] I would, once again, gratefully adopt the principles of law enunciated by Eusoffe Abdoolcader J for the Federal Court in the *Vasudevan*'s case. In *Hongkong Bank (M) Bhd v Raja Letchumi a/p Ramarajoo & Ors* [1996] 2 MLJ 34, Gopal Sri Ram JCA delivering the judgment of the Court of Appeal spoke of the delay that gave rise to prejudice at p 44 of the report:

> In our judgment, the prejudice that will occur when a case is required to be tried several years after its institution and the occurrence of the events giving rise to the alleged cause of action is in itself a ground for striking out an action.

[25] In *Dato' Leong Pow Kue & Ors v Gan Kim Sing* [1998] 7 MLJ 133, I had occasion to say something about 'inordinate and inexcusable delay'. At p 157 of the report, this was what I said:

> It is purely a matter of fact and degree whether there has been an inordinate and inexcusable delay (*Datuk Samy Vellu v Karpal Singh* [1989] 3 MLJ 493; and *The Plato*). The term 'inordinate delay' has been interpreted in *Leong Seng Kiat v Law Peng Guan & Ors* [1992] 2 CLJ 825 at p 827; and *Official Assignee of the Property of George Chen Chih Hsiung v Peter Chi Man Kwong & Ors* [1996] 1 SLR 353 to mean 'materially longer than the times usually regarded by the profession and courts as an acceptable period'. While the term 'inexcusable delay' means no more than there being no satisfactory explanation as to why the case did not proceed with due speed and diligence. In *Leong Seng Kiat v Law Peng Guan & Ors*, the risk of fading memory was highlighted. There the third defendant was 76 years old and the only person who knew the background of the property dispute in which his family members were co-defendants. In such a case, the risk of fading memory was particularly acute. The third defendant too stressed that 'should anything happen to him, his family would not have any witness to testify in support of the defence.' The delay in filing the summons for directions in that case was about 2 1/2 years. Of course, once there is proof of inordinate delay, the onus would naturally fall on the plaintiff to justify it (*The Plato*; *R Rajasingam v Balwant Singh Purba* [1996] 2 MLJ 549 and *Te Cheng Hoi v Peh Im Kweng*). All too often, when cornered the plaintiff admits to having no excuse for the delay at all as seen in the case of *Public Finance Bhd v Natcom Development Sdn Bhd & Ors* [1996] 4 CLJ 291; [1996] 2 MLJ 657 where counsel admitted that the delay was due to an oversight.

[26] In the present case before me, the plaintiff has failed to carry out the prosecution of the case against the third defendant with due diligence and due despatch. In my judgment, the delay here was inordinate and inexcusable and it has seriously prejudiced the third defendant. The following chronology of events would suffice to explain the situation further:

(a) the present action was commenced by the plaintiff on 20March 1989;

(b) the plaintiffs alleged cause of action against the defendants (including the third defendant) was in relation to certain transactions which took place since 1983;

(c) the third defendant files its defence on 7 October 1989;

(d) although the pleadings in the present action against the third defendant was closed on or around October 1989, the summons for directions pursuant to O 25 of the RHC was only filed by the plaintiff on 17 March 1993, and calculation wise from the month of October 1989 until the filing of the summons for directions, there was already a delay of more than four years;

(e) on the date of the hearing of the summons for directions on 11 May 1993, the court ordered, *inter alia*, that the plaintiff was to serve on the defendants within 45 days a list of documents and the affidavit verifying the list of documents;

(f) however, events have shown that the affidavit verifying the list of documents together with the list of documents dated 6 December 1995 which were to be served on the defendants (including the third defendant) by 25 June 1993 was only served on the solicitors for the third defendant on 7 December 1995; and calculation wise, from 25 June 1993 until 7 December 1995, there was a further delay of about 2 1/2 years;

(g) the plaintiff only filed its notice to set the case down for trial on 11 March 1996 and the trial date has yet to be fixed by the court;

(h) it was not until five years later that the plaintiff decided to continue with the prosecution of the present action against the third defendant by filing a notice to attend the case management under O 34 of the RHC on 9 April 2001; and

(i) it was an undisputed fact that the plaintiff did not take any active steps for a period of five years between 1996 to 2001 to prosecute the present action against the third defendant.

[27] It would not be out of place to refer, once again, to the case of *Negara Properties Sdn Bhd v Akitek Bersekutu, Malaysia (sued as a firm) & Ors*. There his Lordship Dato' Dr Visu Sinnadurai J at p 932 sets out the proper test to be applied for striking out in the context of a delay:

> The proper test, as stated in *Allen v AcAlpine* and *Birkett v James*, is that the defendant may, to strike out the plaintiffs action, establish that as a result of the plaintiffs delay there was a risk of either:
>
> (i) there not being a fair trial of the action; or
>
> (ii) of some other prejudice to the defendant other than the mere inability to have a fair trial.

[28] The impact of a delay was also explained by Salleh Abas FJ (as he then was) in the case of *Toh Hock Thye & Ors v Toh Chwee Blow* [1982] 1 MLJ 152 (FC) in this way (see p 154 of the report):

The delay of five years and three months in our view is by no means short. It is long enough to enable a baby to grow into a big child with ability to talk intelligently and be in kindergarten preparatory to normal schooling. In our view such delay apart from being inordinate and inexcusable has also resulted in adverse effects on the respondent. The prejudice to him here is not merely confined to the possibilities of not having a fair trial or in the form of failing memory of the witnesses or lack of documents and non-availability of witnesses but also encompassing the psychological effect which the suit had on him for having it hung over his head for the last five years or so, (see *Biss v Lambeth*). If we take into account the totality of the period from the commencement of the cause of action on 2 October 1951, the time span of this suit would be 28 years 10 months and 24 days. Such a lengthy period is surely too long, extending as it were more than a quarter of a century.

[29] Again on the issue of delay, Abdul Kadir Suleiman J (now JCA) has this to say in *Confidence Concrete Sdn Bhd v Shimizu-Peremba Sdn Bhd* [1994] 1 MLJ 465 at p 474:

Hence, on the authority, I would say that such failure on the part of the defendants to affirmatively state why and how there would be such prejudice, is not fatal to their application. No one would argue that a four-year delay in setting down the suit for trial is not inordinate. Such being the case, it is for the plaintiffs, when faced with such an application by the defendants, to give a credible excuse as otherwise, the natural inference would be that it is inexcusable. On the serious prejudice to the defendants, as a rule, the longer the delay, the greater the likelihood of serious prejudice at the trial. There is much prejudice to the defendants in having the suit against them hanging over their heads indefinitely, not knowing when it is going to be brought to trial. After all, it is the plaintiffs who chose to take an action against them. If the plaintiffs are indolent after that to pursue the matter, enjoying a deep slumber, the defendants on the other hand cannot sleep well so long as the suit is hanging over their heads. Had it not been for the defendants in this case waking up the plaintiffs from their slumber, the suit would remain in the court's record until such time as the court exercises its power under O 34 r 7A(2) of the RHC.

[30] Still on the issue of delay, Shaik Daud bin Mohd Ismail JCA (as he then was) in *TM Feroze Khan Ors v Meera Hussain bin TM Mohamed Mydin* [1997] 3 MLJ 800 had this to say:

There is, therefore, no doubt there was this long delay, and a deliberate one at that. It only remains for consideration whether such delay has prejudiced the respondent. In our view it undoubtedly has. There is much prejudice to a defendant in having an action hanging over his head indefinitely, not knowing when it is going to be brought to trial (see *Hongkong Bank (M) Bhd v Raja Letchumi a/p Ramarajoo* [1996] 2 AMR 34:2553; [1996] 2 MLJ 34).

[31] All these authorities would assist this court in appreciating the impact of the delay occasioned by the plaintiff in prosecuting the present action. It must be emphasised that as a result of the delay — 21 years since the date of the alleged transactions and 15 years since the filing of the present action, the

memory of the third defendant who is now 78 years old and who had undergone a neuro-surgery operation in 1985 had deteriorated drastically and as a result thereto the third defendant is seriously prejudiced from having a fair trial.

[32] The delay too would cause the memory of the third defendant's witnesses to deteriorate and it is said that there is a high probability that the documents and the witnesses could not be located and traced. It must be borne in mind that there was such a long lapse of time between the date of the alleged transactions in 1983 and the trial — even the date of the trial has not been fixed. I reiterate that the eleventh defendant by the name of Datuk Haji Mohamed Ali ST Tan, a material witness for the third defendant, had already passed away on 10 February 2003. To compound the matter further, the inordinate and inexcusable delay on the part of the plaintiff has caused the present action to be hanging over the head of the third defendant indefinitely and it has unfairly burdened the third defendant for 15 long and lingering years.

[33] Incidentally, the plaintiff has failed to serve on the third defendant a notice of its intention to proceed with the action despite the delay of more than one year since the last proceeding against the third defendant as required under O 3 r 6 of the RHC. For the reasons as adumbrated above, I must allow the third defendant's appeal in encl 188 with costs.

ENCLOSURE 189 — THE SEVENTH DEFENDANT (KUAN PENG CHINE ®, KUAN PENG SOON)

[34] Enclosure 189 was the seventh defendant's appeal to the judge in chambers against the refusal of the SAR to strike out the writ of summons and the statement of claim of the plaintiff pursuant to O 18 r 19, O 92 r 4 and O 21 r 3 of the RHC.

[35] The plaintiffs case against the seventh defendant may be stated in this way.

[36] In these proceedings, the seventh defendant was a director of the plaintiff until 13 March 1989 when he resigned from the board of directors. The plaintiffs statement of claim alleged that on 6 October 1983, an agreement was entered into between the eleventh defendant by the name of Datuk Haji Mohamed Ali ST Tan — the principal player in the present case, and the plaintiff. That agreement may be referred to as the OBB agreement (short for Oriental Bank Berhad's agreement) and under that agreement the eleventh defendant agreed to sell the shares in Oriental Bank Berhad ('OBB') to the plaintiff for RM451675,000. The terms of the OBB agreement may be stated as follows:

(a) that RM15,675,000 was to be paid on execution and RM30,000,000 within 14 days after the approvals of the relevant authorities were obtained;

(ii) that the OBB agreement was to be terminated if the approvals from the relevant authorities were not obtained within six months or such longer period as agreed then the RM15,675,000 was to be refunded and the plaintiffs solicitors and the 19th defendant were to return the OBB share certificates to the eleventh defendant; and

(c) that on the 28 September 1983, the plaintiff had already paid to the eleventh defendant the sum of RM15,675,000.

[37] On 6 October 1983 — the same date as the OBB agreement, the plaintiff and the 11th defendant entered into an agreement called the 1983 deed of mutual agreement (hereinafter referred to as the '1983 deed'). Now, the 1983 deed also governed the sale of the OBB shares in respect of the OBB agreement. The difference lay in the terms of the 1983 deed and that would be in this manner:

(a) that the sum of RM30,000,000 was to be paid by the plaintiff to the eleventh defendant on or before 30 December 1983;

(b) only then would the 19th defendant release the OBB share certificates to the plaintiff even if the approvals of the relevant authorities had not been obtained; and

(c) that it was also a term of the 1983 deed that the contents of the said deed were to remain confidential.

[38] Pursuant thereto, the plaintiff made the following payments to the eleventh defendant:

Amount Paid	Date of Payment
RM10,000,000	29 December 1983
RM10,000,000	30 December 1983
RM500,000	23 January 1984

[39] In addition to that, the sum of RM1,800,000.00 was paid to the 18th defendant at the 11th defendant's request on 18 April 1984. After taking into account the payments referred to above, the balance that remained out of the RM30,000,000 that was supposed to have been paid was in the sum of RM7,700,000.

[40] It was agreed between the plaintiff and the 11th defendant that the balance of RM7,700,000 was to be satisfied by re-payment by the plaintiff to the 18th defendant of loans in the sums of RM6,000,000 and RM3,500,000 due from the 16th and 17th defendants to the 18th defendant. Sad to say the plaintiff did not make payment of the balance sum of RM7,700,000 to the

18th defendant and so the plaintiff was in breach of the terms agreed upon between the plaintiff and the eleventh defendant. That being the case, the eleventh defendant treated the plaintiff to be in breach of the terms of the 1983 deed and accepted the plaintiffs repudiation.

[41] Later, in an attempt to reach an amicable settlement, negotiations were carried out between the plaintiff and the 11th defendant. The negotiations were successful and the following parties entered into the deed of mutual arrangement dated 10 May 1985 (hereinafter referred to as the '1985 deed of mutual arrangement'):

(i) the 11th defendant;

(ii) the 12th defendant;

(iii) the 13th defendant;

(iv) the 15th defendant; and

(v) one Lien Hoe Land Sdn Bhd (now known as Peak Hua Land SdnBhd).

[42] Now, the main terms of the 1985 deed of mutual arrangement were as follows:

(a) that the 11th defendant would re-purchase the OBB shares from the plaintiff for the sum of RM49,513,612.34;

(b) this comprised the sum of RM45,675,000 which was to have been satisfied as follows:

(c) by the sale of a piece of land ('the STSB land') by the defendants to Peak Hua Land Sdn Bhd for the sum of RM22,750,000;

(d) by the sale of the entire issued share capital of Taman Templer Sdn Bhd ('TTSB') by the 12th and the 13th defendants to the plaintiff for the sum of RM 16,000,000; and

(e) by the issue of promissory notes worth RM10,681,612.34 by the eleventh defendant to the plaintiff.

[43] The OBB shares were then returned to the eleventh defendant and the STSB land and the TTSB shares were transferred to the plaintiff pursuant to two sale and purchase agreements dated 31 December 1984 and 10 May 1985 respectively.

[44] The 11th defendant issued the promissory notes to the plaintiff but no payments were made pursuant to the promissory notes. The fact of the matter was this. That the 11th defendant failed to make payments under the promissory notes. This prompted the 11th defendant to subsequently enter into a settlement agreement with the plaintiff as reflected in the following letters dated:

(a) 8 February 1989;

(b) 11 February 1989; and

(c) 16 February 1989.

[45] By that settlement agreement, the plaintiff agreed to accept, *inter alia*, the transfer of 500,000 ordinary shares of Pengkalan Holdings Berhad and 1,000 ordinary shares of US1,000 each in Grand Union Assurance Company Ltd in full and final settlement of any sums due from the 11th defendant to the plaintiff. It was quite apparent that the reasons why the promissory notes were not enforced by the plaintiff was because of the non compliance with the provisions of the Bills of Exchange Act 1949 and the Stamp Act 1949.

[46] The plaintiff alleged, *inter alia*, breaches of fiduciary duties against the second, third, fouth, fifth, sixth and the seventh defendants who were all directors of the plaintiff for approving the various transactions. The plaintiff also alleged negligence against their then legal adviser — referring to the 19th defendant, and the Finance Company (the 18th defendant) that were involved in the transactions. The eighth, ninth, tenth, 11th, 12th, 13th, 14th, 15th, 16th and 17th defendants were brought in as parties to the above mentioned transactions and also as alleged constructive trustees of any property received by them pursuant to the transactions.

[47] It must be borne in mind that the seventh defendant has filed a defence dated 17 July 1990 averring to the following facts:

(a) that the controlling shareholders of the plaintiff, at the material time, had approved the proposed purchase of the OBB shares and subsequent transactions therein;

(b) that the seventh defendant had acted, at all material times, in the best interest of the plaintiff and on the advice of the 19th defendant and other solicitors who were responsible for drafting the legal documentation for the transactions; and

(c) that, at all material times, there were proper resolutions and meetings held to approve the above mentioned transactions.

[48] It must also be borne in mind that the plaintiff has since withdrawn the legal proceedings against the second, eighth, ninth, tenth and 18th defendants. The 11th defendant, as I said earlier, has since passed away on 10 February 2003.

[49] Interlocutory proceedings too have been pending since 1989. The third, fourth, fifth, sixth and seventh defendants being ex-directors of the plaintiff have respectively filed striking off applications in 2002 based on the following salient reasons:

(a) for want of prosecution;

(b) that the substantial and serious delay has greatly prejudiced the ex-directors;

(c) that the action against the ex-managing director by the name of Roger Tan Kim Hock — the second defendant, was discontinued on 23 November 2001 without compliance with the RHC bearing in mind that the second defendant was the

principal player who suggested the OBB deal to the ex board of directors of the plaintiff; and that the other principal player in the person of the 11th defendant by the name of Datuk Haji Mohamed Ali ST Tan, as I said earlier, had since passed away on 10 February 2003.

[50] I have purposely set out the facts in relation to the seventh defendant in some detail and those facts would certainly enable me to decide on encl 189. Two pertinent issues arose as a result of the recitation of the facts. The first being the question of whether the plaintiffs writ of summons and the statement of claim and the subsequent action in these proceedings constituted an abuse of the process of the court and so should be struck out under O 18 r 19 of the RHC. The second issue relate to the all important question of whether the plaintiffs writ of summons and the statement of claim should be dismissed by the High Court for want of prosecution.

[51] I will now examine the first issue. It was the stand of the seventh defendant that the plaintiff has abused the process of the court by serving a notice of discontinuance after obtaining substantial advantages in the action to the prejudice of the seventh defendant. As stated earlier, proceedings against the second and the 18th defendants have been discontinued in an arbitrary manner and which was contrary to O 21 r 3 of the RHC. In regard to the notice of discontinuance without leave, Lord Scarman had this to say in *Castanho v Brown & Root (UK) Ltd & Anor* [1981] AC 557 (HL) at p 571 of the report:

> The court has inherent power to prevent a party from obtaining by the use of its process a collateral advantage which it would be unjust for him to retain: and termination of process can, like any other step in the process, be so used. I agree, therefore, with Parker J and Lord Denning MR that service of a notice of discontinuance without leave, though it complies with the rules, can be an abuse of the process of the court.

[52] There is a passage appearing in the Malayan Law Journal: *'Malaysian Court Practice 1995'* under note 21.2.4 at p 803 that merits reproduction. It is this:

> [21.2.4] Abuse of process
>
> The plaintiff is said to have an unqualified right under r 2(1) to discontinue his action with the leave of the court either before the service of the defence on him or within 14 days of such service. If the plaintiff abuses such right by serving a notice of discontinuance after obtaining substantial advantages in the action to the prejudice of the defendant, eg, by securing substantial interim payments and an admission of liability or otherwise, he will be guilty of an abuse of the process of the court. In such event, the court will have power to set aside his notice of discontinuance or exercise its discretion by granting him leave to discontinue subject to terms to be imposed. For the occurrence of such an abuse, reference should be made to *Castanho v Brown & Root (UK) Ltd* [1981] AC 557, [1980] 1 All ER 143, HL. The court may also intervene by striking out the action if it is

proper to do so on the occasion of discontinuance of an action: *Gold Reefs of Western Australia v Dawson* [1897] 1 Ch 115. In *Fakih Brothers v AP Moller (Copenhagen) Ltd & Ors* [1994] 1 Lloyds Rep 755, the court had to determine whether the notice of discontinuance served on the plaintiff should be set aside as an abuse of process of court upon the application of the defendant. The court considered and applied the decision in *Castanho v Brown & Root (UK) Ltd*, above.

[53] It was the submission of the seventh defendant that the second defendant by the name of Roger Tan Kim Hock was the principal player in the events leading to the signing of the exhibit marked as 'KPS–2' of the first affidavit and as borne out in the minutes of the board of directors meeting dated 21 September 1983 of Lien Hoe Industries Berhad — the company belonging to the plaintiff as seen in exhibit 'KPS–3' of the second affidavit. In *Majlis Peguam Malaysia & Ors v Raja Segaran S. Krishnan* [2002] 3 MLJ 155, Gopal Sri Ram JCA delivering an oral judgment for the Court of Appeal aptly said at p 377 of the report:

> What comes across clearly from the authorities that they have referred to is the fact that a judge exercising his power under O 21 r 3 which permits discontinuance has a wide discretion. But it is not an unprincipled discretion. There are important guidelines that act as beacons, guiding him through those blurred areas of which we spoke a moment ago.
>
> One of these guidelines is that if a defendant is dominus litis, the general rule is to refuse leave to discontinue. See *Overseas Union Finance Ltd v Lim Joo Chong* [1971] 2 MLJ 124. Another guideline is that where the case is at a very advanced stage, care should be taken not to permit discontinuance. And what constitutes an advanced stage depends on the facts and circumstances of each case as illustrated by the case of *Fox v Star Newspaper Company* [1898] 1 QB 636. Another consideration; yet another guideline; which a judge ought to bear in mind is any interim or interlocutory advantage that the plaintiff may have gained between the date of issue of the writ and the point of time which he seeks to discontinue: *O'Neal v Mann* [2000] FCA 1680.
>
> The upshot is that it all depends on the facts and circumstances of each case bearing in mind that one ought not to depart from the other parameters established by the guidelines to which we have referred.

[54] It is interesting to note that the phrase '*dominus litis*', according to 'Trayner's Latin Maxims' at p 170 means:

> The person to whom a suit belongs, and who has the real interest in its decision, deriving the benefit of a favourable, and suffering the consequences of an adverse judgment. One may be *dominus litis* whose name does not appear in the proceedings either as pursuer or defender; and he will be liable in the expenses of process, if these are found due by the person under cover of whose name he has been litigating. *Corsan v M'Lauchlan* 6 S 505; *Hepburn v Tait* IR 875.

[55] Be that as it may, the plaintiffs action in proceeding against the rest of the directors for the collective decision of the board of directors of which the second defendant was the then managing director must be held to be vexatious,

not bona fide and must be construed as an abuse of the process of the court. Yong Fung How CJ Singapore in *Goh Koon Suan v Heng Gek Kiau & Ors* [1991] 2 MLJ 307 allowed the second to the fifth defendants' applications for the writ of summons and the statement of claim to be struck out on the grounds that the proceedings were vexatious and an abuse of the process of the court under O 18 r 19 of the Rules of the Supreme Court 1970. In *Raja Zainal Abidin bin Raja Haji Tachik & Ors v British-American Life & General Insurance Bhd* [1993] 3 MLJ 16, Pen Swee Chin SCJ speaking for the then Supreme Court held that the High Court always has an inherent jurisdiction to prevent an abuse of its process.

[56] It must be borne in mind that the plaintiff has chosen not to reply to paras 5 and 8(iii) of the first affidavit which categorically shows through exh 'KPS–1' of the first affidavit that the plaintiff had forwarded a notice of discontinuance to the seventh defendant's solicitors in May 1993 to discontinue the proceedings against the first, eighth, seventh, ninth and tenth defendants. In the circumstances, substantial prejudice would be caused to the seventh defendant if the plaintiff was allowed to proceed against the rest of the directors in the present action particularly when the seventh defendant has been led to believe that the action has been discontinued. I would, accordingly, answer the first issue in the affirmative.

[57] In regard to the second issue, I have this to say.

[58] The seventh defendant is a businessman as well as a director. To allow the action to hang over his head for an indefinite length of time — to be precise for 14 long years, would surely constitute prejudice (*Datuk Samy Vellu v Karpal Singh* [1989] 3 MLJ 493). That prejudice to the seventh defendant would take the following forms:

(1) in not having a fair trial of the action;

(2) in the form of failing memory of the witnesses;

(3) in the failure to procure the attendance of witnesses who may be dead; and

(4) of crucial importance, the psychological effect which the suit may have on him for having the suit hanging over his head for the last 14 years.

[59] At this juncture, it would be ideal to refer to the case of *Toh Hock Thye & Ors v Toh Chwee Biow* and this compelled me to answer the second issue in the positive. The end result would be this. That the seventh defendant's appeal in encl 189 should be allowed with costs.

ENCLOSURE 190 — THE FIFTH AND THE SIXTH DEFENDANTS (CHIN YIM KUAN AND LIM KOK C NEONS RESPECTIVELY)

[60] The facts and the law as alluded to by me when dealing with encls 187, 188 and 189 would be relied upon by me in dealing with encl 190.

[61] It was rather obvious that based on the relevant affidavits pertinent to encl 190 and the evidence thereto that the plaintiffs claim in the writ of summons dated 20 March 1989 and the statement of claim against the fifth and the sixth defendants as the non-executive directors in the plaintiffs board of directors, at the material time, must be held to be scandalous, frivolous or vexatious because the plaintiffs action in discontinuing this action against the second defendant who was the managing director of the plaintiff's company, at the material time, and proceeding against the fifth and the sixth defendants who were the non-executive directors in the plaintiffs board of directors was frivolous and vexatious because all of them being directors of the plaintiffs company have acted collectively in the said board. To confound the matter further, the discontinuance of this action against the second, 18th, first, eighth, ninth and tenth defendants were wrong and bad in law as it contravened the provisions of O 21 r 2(4) and r 3(1) of the RHC and it was also an abuse of the process of the court and it should be struck out forthwith. Now, the rationale for discontinuance of an action or claim with leave was nicely explained by Chitty LJ in *Fox v Star Newspaper Co* [1898] 1 QB 636 at p 639 in this way:

> The principle of the rule is plain. It is that after the proceedings have reached a certain stage the plaintiff, who has brought his adversary into court, shall not be able to escape by a side door and avoid the contest. He is in no longer *dominis litis*, and it is for the judge to say whether the action shall be discontinued or not and upon what terms.

[62] In addition to that, I must also say that the plaintiffs action should be dismissed for want of prosecution because it failed to proceed promptly in accordance with the successive steps in the action following closely the prescribed rules of practice and there was also the blatant disregard of the order of the court in regard to the summons for directions on 11 May 1993. The plaintiff was entirely to blame for the delay in that there was a total disregard of the rules of the court and all these must be construed to be an abuse of the process of the court. It must be borne in mind that the rules of the court generally provides that where the plaintiff has failed to take the necessary step which the rules require him to take, the defendant may apply to the court to dismiss the action for want of prosecution. It must not be forgotten that the court has an inherent jurisdiction to dismiss an action for want of prosecution where there is default in complying with an order of the court or where the plaintiff is guilty of excessive delay in the prosecution of the action. Public policy too coupled with the requirements for the speedy and smooth administration of justice demand that an action should proceed expeditiously to judgment.

[63] Here, there was an inordinate delay on the part of the plaintiff in prosecuting this action. The delay of nearly 15 years after the action was filed in court will definitely prejudice the defence of the fifth and the sixth defendants

and it will further embarrass or delay the fair trial of this action. To say the least, the delay in the prosecution of this action has been inordinate and inexcusable and it constituted an abuse of the process of the court. In my judgment, the plaintiffs action should be dismissed for want of prosecution and for being an abuse of the process of the court (*Negara Properties Sdn Bhd v Akitek Bersekutu, Malaysia (sued as a firm) & Ors*).

[64] I will now narrate the facts.

[65] The plaintiffs action against the fifth and the sixth defendants in the writ of summons dated 20 March 1989 and the statement of claim as per encl 1 were against the former directors of the plaintiff in respect of the purchase of shares in OBB by the plaintiff from the 11th defendant. At the material time, the second to the seventh defendants were the directors in the plaintiffs board of directors. The plaintiff has discontinued this action against the second defendant by way of the notice of discontinuance dated 23 November 2001 as per encl 147. The second defendant was the managing director in the plaintiff's company and the fifth and sixth defendants were the non-executive directors in the plaintiffs board of directors at the material time. In a meeting of the plaintiffs board of directors held on 21 September 1983, the second defendant as the managing director of the plaintiffs company informed the members that there was a chance for the plaintiff to purchase shares in OBB from the 11th defendant. The second defendant made representation that the purchase of the OBB shares was a good investment for the plaintiff and that he was one of the plaintiffs directors who executed the sale and purchase agreement dated 6 October 1983 in respect of the purchase of the OBB shares for the plaintiff with the 11th defendant. But the said purchase could not be completed because the approval of Bank Negara cannot be obtained. Based on these facts, the second defendant as the managing director of the plaintiffs company has played a major and active role in the transaction to purchase the OBB shares and has personal knowledge of the said transaction. All these facts were supported by the minutes of the board of directors meeting held on 21September 1983 and the sale and purchase agreement dated 6 October 1983.

[66] Now, the plaintiffs action in discontinuing this action against the 2nd defendant as the managing director of the plaintiffs company who has played an active role in the purchase of the OBB shares clearly showed that the plaintiff has no intention at all to continue the present action against the second to the seventh defendants who were the former directors in the plaintiffs board of directors, at the material time, as they have acted collectively in the plaintiffs board of directors. Therefore, it can be surmised that the plaintiffs action in discontinuing this action against the second defendant who was responsible in the management of the plaintiffs company at the material time whilst proceeding against the fifth and the sixth defendants who were the non-executive directors in the plaintiffs board of directors must be construed to be frivolous, vexatious and an abuse of the process of the court.

[67] To aggravate the matter further, the plaintiff has also discontinued this action against the 18th defendant by way of the notice of discontinuance dated 25 September 1992 as per encl 116 and also against the first, eighth, ninth and tenth defendants. This piece of information was never brought to the attention of the fifth and the sixth defendants at any time and neither did they consent to the discontinuance nor was there leave of the court being obtained for that purpose. It was wrong on the part of the plaintiff to have done what they did and it was also bad in law as it contravened the provisions of O 21 r 2(4) and r 3(1) of the RHC.

[68] In my judgment, the plaintiff's action should be dismissed for want of prosecution in failing to comply with the rules of the court. Factually speaking, the writ of summons and the statement of claim in encl 1 were filed on 20 March 1989 and they were served on the fifth and the sixth defendants' solicitors on 5 May 1989. The fifth and the sixth defendants' solicitors filed the memorandum of appearance dated 12 May 1989 as per encl 29 on 16 May 1989 and the defence dated 29 August 1989 as per encl 52 on 4 September1989. Since then, no action was taken by the plaintiff until almost three years seven months when the summons for directions in encl 117 was filed on 17 March 1993 and served on the fifth and the sixth defendants' solicitors by the plaintiffs solicitors' letter dated 12 April 1993. Clearly therefore the plaintiff has failed to file the summons for directions within the time stipulated in O 25 r 1 of the RHC which provides that the said summons must be filed within one month after the pleadings in the action are deemed to be closed. According to *Mallal's Supreme Court Practice* by Tan Sri Datuk Chang Min Tat (2nd Ed, Vol 1) at p 324:

> The plaintiff must take out a summons for directions. It is compulsory on the plaintiff to take out this summons for directions. If he does not do so within the time specified, the defendant may do so or at his option apply for an order to dismiss the action: para (4).
>
> The summons for directions must except in the circumstances set out in para (2) be taken out within one month after the pleadings in the action are deemed to be closed (as to which see O 18 r 20), in other words, after discovery and inspection of documents under O 24 have been made and given. The summons must be made returnable in not less than 14 days.

[69] The following authorities should also be referred to as they are relevant to the issue at hand:

(1) *In the matter of Austral Amalgamated Bhd & Ors* [1998] MLJU 442;

(2) *Ho Weng Kong v Mann Foong Realty Sdn Bhd & Anor* [2000] MLJU 222;

(3) *Trustees of Leong San Tong Khoo Kongsi (Penang) Registered & Anor v Lee Boon Tin* [1998] 4 MLJ 373 (CA);

(4) *Omega Securities Sdn Bhd v Public Bank Bhd* [1999] 5 MLJ 1;

(5) *Mayban Securities Sdn Bhd v Fung Lai Chuen (f) & Anor* [2002] 7 MLJ 411; and

(6) *R Rajasingam v Balwant Singh Purba* [1996] 2 MLJ 549 (CA).

[70] Suffice for me to say that the length of the delay here was certainly inordinate and inexcusable. Lord Denning MR in *Biss v Lambeth, Southwark and Lewisham Area Health Authority (Teaching)* remarked that (see pp 390 to 391 of the report):

> Even a short delay after the writ may in many circumstances be regarded as inordinate and inexcusable: and give a basis for an application to dismiss for want of prosecution. So in the present case the delay of nine months was properly admitted to be inordinate and inexcusable. It is a serious prejudice to the hospital to have the action hanging over its head even for that time. On this simple ground I think this action should be dismissed for want of prosecution.

[71] Here, the plaintiff took steps to set the action down for trial after almost seven years. The plaintiff's claim arose from an event which took place some 20 years ago and this inordinate and inexcusable delay will give rise to a substantial risk that a fair trial would not be possible or that it would likely to cause or to have caused serious prejudice to the fifth and the sixth defendants' defence in the action as it would be very difficult for them to remember in detail the facts which took place in 1983. As businessmen, it was totally unfair to allow this action to hang over the heads of the fifth and the sixth defendants since 1989. The fifth and the sixth defendants were seriously prejudiced.

[72] For all these reasons, I allowed the fifth and the sixth defendants' appeal in encl 190 with costs.

Appeals allowed with cost.

Reported by Izzaty Izzuddin